Nauran bt Abdul Majid & Anor v Jabatan Perkhidmatan Pembentungan Malaysia & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-23NCvC-26–07 OF 2018
JULIE LACK J
30 DECEMBER 2023

Tort — Trespass to land — Damages — Plaintiffs allowed defendant contractor to enter upon their land to carry out work but withdrew consent on finding defendant had damaged the land and crops thereon — Despite plaintiffs' prohibition defendant continued to enter the land to carry out work — Whether plaintiffs had proven claims for breach of duty of care, negligence and trespass against defendant — Whether plaintiffs were entitled to compensation for damage and losses suffered

The plaintiffs, who owned a piece of land that was planted with coconut and banana trees ('the land'), sued the first, second and third defendants ('D1', 'D2' and 'D3') for damages for breach of duty of care, negligence and trespass. The case against D1 and D3 was struck out and only the claim against D3 proceeded to trial. D1 was a government agency which had hired D2 to carry out a water project for which D3 was the overseeing consultant. In March 2015, D2 obtained the plaintiffs' consent to work on a part of their land for a period of three months and paid the plaintiffs rental for the purpose. On subsequently finding that D2 had dug a huge uncovered trench on the land, caused flooding and destruction to the trees and vegetation and had left machinery and equipment abandoned on the land, the plaintiffs lodged several police reports against D2 and notified D2 by letter that it was no longer allowed to enter the land without their permission. The plaintiffs also notified D2 that unless it restored the land to its original state, paid compensation for the damage that had been caused, removed all the machinery and equipment and vacated the land within a given timeframe, legal action would be taken. D2 did not heed the plaintiffs' notice and continued to enter upon the land to carry out works. In the instant action, the plaintiffs sought, inter alia, general and aggravated damages against D2 for trespass, breach of duty of care and negligence and an order restraining D2 from further entering upon the land without the plaintiffs' permission. In its defence, D2 contended, inter alia, that it could not be held liable for the plaintiffs' claims because it had acted on D1's and D3's instructions to carry out the works, which was a project benefitting the public, and that the plaintiffs'claim was barred under s 38 of the Government Proceedings Act 1956. At the trial, the plaintiffs claimed for a total sum of RM504,180 as damages, made up of RM265,000 for rectification works, RM3,180 for survey costs, RM90,000 as loss of rental at RM2,500 per

month for 36 months from June 2015 to June 2018, RM10,000 for loss of trees and for damage caused by flooding, RM100,000 as damages for trespass and RM36,000 for legal fees.

Held, allowing the plaintiffs' claim and ordering D2 to pay the plaintiffs RM440,680 in damages together with interest and costs:

(1) On balance of probabilities, the plaintiffs had proven their pleaded case against D2 on the grounds of breach of duty of care, negligence and for trespass and had shown that they were entitled to compensation for the losses and damage they suffered. D2's defence containing bare assertions and afterthoughts was devoid of merits and was rejected. D2's sole witness at the trial, DW1, was of no assistance to D2's case. He admitted that he had no personal knowledge of the plaintiffs' dispute with D2, that he had never visited the land and was not an employee, director or shareholder of D2 and had no connection whatsoever with D2. His evidence was therefore, at best, hearsay and inadmissible as it contravened s 60(1) of the Evidence Act 1950 (see paras 74–75, 77, 84 & 88–87).

(2) Adverse inference under s 114(g) of the Evidence Act had to be invoked against D2 for not calling to testify a number of key individuals who were directly involved in dealings with the plaintiffs with regard to the land. These individuals were the best witnesses to shed light on the dispute and the circumstances leading to it. They could have cleared any doubt as to whether there was an oral conversation in regard to the use of the land and compensation for the same. They were material to the present case but D2 did not proffer any reasons for not calling them. The court could only surmise that, if called, they would have given evidence that would not have favoured D2 (see para 72).

(3) There was no evidence to show the works carried out by D2 on the land were for the public interest or that they were done on the instructions of D3. D2 was also not a government body and thus could not claim any form of immunity under the Government Proceedings Act 1956. D2 was simply a company that could be sued for damages arising out of negligence or trespass (see paras 44–45).

(4) The court allowed the plaintiffs' claim for RM265,000 for rectification works as this amount was based on a quotation provided by a private and independent contractor, PW5, who was closely cross-examined, yet came out unscathed. PW5's reasons for charging that amount were sound and had basis and was consistent with logic and common sense and the court found the figure to be reasonable in all the circumstances. In any event, there was no counter quotation from D2 to rebut the sum claimed by the plaintiffs (see paras 91–92).

(5) The court allowed the plaintiffs' claim for loss of use of the land at the rate of RM2,500 per month (the rent that was offered by D2 to the plaintiffs for use of their land) from June 2015 until June 2018 (thus making a total of RM90,000). The claim for RM3,180 for survey costs was also allowed. However, the claim for RM10,000 for loss of vegetation and damage due to flooding was not proven, hence only a nominal sum of RM2,500 was allowed under this head (see paras 89–90).

(6) The plaintiffs' claim for aggravated damages was justified and the court was of the view that RM80,000 was a reasonable sum to be awarded. Not only did D2 ignore the plaintiffs' letters to leave the land but it continued to trespass upon it, causing damage to the land and making it impossible for the plaintiffs to enjoy peaceful and quiet enjoyment of the land. The plaintiffs were deprived of the use of their land due to D2's deliberate acts which were solely motivated by economic reward and commercial gains for themselves. D2 had acted in a high-handed, contumelious and oppressive manner without any care and concern for the plaintiffs' feelings or their constitutional rights (see paras 94–95).

[Bahasa Malaysia summary

Plaintif-plaintif yang memiliki sebidang tanah yang ditanam dengan pokok kelapa dan pisang ('tanah tersebut'), menyaman defendan pertama, kedua dan ketiga ('D1', 'D2' dan 'D3') untuk ganti rugi kerana melanggar tugas berhati-hati, kecuaian dan pencerobohan. Kes terhadap D1 dan D3 telah dibatalkan dan hanya tuntutan terhadap D3 diteruskan untuk perbicaraan. D1 adalah sebuah agensi kerajaan yang telah melantik D2 untuk menjalankan projek air yang mana D3 adalah perunding penyeliaan. Pada Mac 2015, D2 telah mendapat persetujuan plaintif-plaintif untuk mengusahakan sebahagian tanah mereka bagi tempoh tiga bulan dan menyewa tanah tersebut daripada plaintif-plaintif. Selepas itu mendapati D2 telah menggali parit besar yang tidak ditutup yang menyebabkan banjir dan kemusnahan kepada pokok-pokok dan tumbuh-tumbuhan serta menyebabkan jentera dan peralatan terbiar di atas tanah itu, plaintif-plaintif telah membuat beberapa laporan polis terhadap D2 dan memaklumkan D2 melalui surat bahawa mereka tidak lagi dibenarkan memasuki tanah itu tanpa kebenaran mereka. Plaintif-plaintif juga memaklumkan D2 bahawa mereka harus mengembalikan tanah itu kepada keadaan asalnya, membayar pampasan bagi kerosakan, mengeluarkan semua jentera dan peralatan serta mengosongkan tanah itu dalam tempoh masa yang diberikan, jika tidak tindakan undang-undang akan diambil. D2 tidak mematuhi notis plaintif dan terus memasuki tanah tersebut untuk menjalankan kerja-kerja tersebut. Dalam tindakan ini, plaintif-plaintif memohon, antara lain, ganti rugi am dan teruk terhadap D2 kerana menceroboh, melanggar kewajipan tugas berhati-hati dan kecuaian serta perintah menghalang D2 daripada terus memasuki tanah itu tanpa kebenaran plaintif. Dalam pembelaannya, D2 berhujah, antara lain,

bahawa mereka tidak boleh dipertanggungjawabkan atas tuntutan plaintif kerana mereka bertindak atas arahan D1 dan D3 untuk menjalankan kerja-kerja itu, yang merupakan projek yang memberi manfaat kepada orang ramai, dan tuntutan plaintif dihalang di bawah s 38 Akta Prosiding Kerajaan 1956. Di dalam perbicaraan itu, plaintif-plaintif menuntut sejumlah RM504,180 sebagai ganti rugi, iaitu RM265,000 untuk kerja-kerja memperbaiki, RM3,180 untuk kos ukur, RM90,000 sebagai kehilangan sewaan pada RM2,500 sebulan selama 36 bulan dari Jun 2015 hingga Jun 2018, RM10,000 bagi kehilangan pokok dan kerosakan akibat banjir, RM100,000 sebagai ganti rugi untuk menceroboh dan RM36,000 untuk yuran guaman.

Diputuskan, membenarkan tuntutan plaintif-plaintif dan memerintahkan D2 untuk membayar plaintif-plaintif wang sejumlah RM440,680 untuk kerugian berserta faedah dan kos-kos:

(1) Atas imbangan kebarangkalian, plaintif-plaintif telah membuktikan kes rayuan mereka terhadap D2 atas alasan pelanggaran tugas berhati-hati, kecuaian dan pencerobohan dan telah menunjukkan bahawa mereka berhak mendapat pampasan bagi kerugian dan kerosakan yang dialami. Pembelaan D2 yang mengandungi pernyataan kosong dan pemikiran terkemudian tidak mempunyai merit dan ditolak. Saksi tunggal D2 pada perbicaraan itu iaitu DW1 tidak membantu kes D2. Dia mengakui tidak mempunyai pengetahuan peribadi mengenai pertikaian plaintif dengan D2, tidak pernah melawat tanah tersebut dan bukan merupakan seorang pekerja, pengarah atau pemegang saham D2 dan tidak mempunyai sebarang kaitan dengan D2. Oleh itu, keterangannya adalah dengar cakap ('hearsay') dan tidak boleh diterima kerana ianya bercanggah dengan s 60(1) Akta Keterangan 1950 (lihat perenggan 74–75, 77, 84 & 88–87).

(2) Anggapan bertentangan di bawah s 114 (g) Akta Keterangan terpaksa digunapakai terhadap D2 kerana tidak memanggil beberapa individu utama yang terlibat secara langsung dalam urusan dengan plaintif-plaintif berhubung tanah tersebut untuk memberi keterangan. Individu-individu ini adalah saksi terbaik untuk menjelaskan pertikaian dan keadaannya. Mereka boleh menjelaskan sebarang keraguan sama ada terdapat perbualan lisan mengenai penggunaan tanah dan pampasannya. Mereka adalah penting untuk kes ini tetapi D2 tidak memberikan sebarang alasan kerana tidak memanggil mereka. Mahkamah hanya boleh beranggapan bahawa, sekiranya dipanggil, mereka akan memberikan keterangan yang tidak memihak kepada D2 (lihat perenggan 72).

(3) Tiada keterangan yang menunjukkan bahawa kerja-kerja yang dijalankan oleh D2 di tanah tersebut adalah untuk kepentingan awam

atau dilakukan atas arahan D3. D2 juga bukanlah badan kerajaan dan tidak boleh menuntut sebarang bentuk kekebalan di bawah Akta Prosiding Kerajaan 1956. D2 hanyalah sebuah syarikat yang boleh disaman bagi ganti rugi yang timbul daripada kecuaian atau pencerobohan (lihat perenggan 44–45).

(4) Mahkamah membenarkan tuntutan plaintif-plaintif sebanyak RM265,000 bagi kerja-kerja memperbaiki kerana jumlah itu berdasarkan sebut harga yang disediakan oleh kontraktor swasta dan bebas iaitu PW5 yang diperiksa balas dengan teliti dan tidak dicabar. Alasan-alasan PW5 yang meletakkan jumlah itu kukuh dan mempunyai asas serta selaras dengan logik akal dan mahkamah mendapati angka itu munasabah dalam semua keadaan kes. Dalam apa jua keadaan, tiada sebut harga balas daripada D2 untuk membantah jumlah yang dituntut oleh plaintif-plaintif (lihat perenggan 91–92).

(5) Mahkamah membenarkan tuntutan plaintif-plaintif untuk kehilangan penggunaan tanah itu pada kadar RM2,500 sebulan (harga sewaan yang ditawarkan oleh D2 kepada plaintif-plaintif untuk kegunaan tanah mereka) dari Jun 2015 hingga Jun 2018 (dengan itu menjadikan jumlah keseluruhan sebanyak RM90,000). Tuntutan sebanyak RM3,180 bagi kos ukur juga dibenarkan. Walau bagaimanapun, tuntutan untuk RM10,000 bagi kehilangan tumbuh-tumbuhan dan kerosakan akibat banjir tidak dapat dibuktikan, oleh itu hanya jumlah nominal RM2,500 dibenarkan di bawah tuntutan ini (lihat perenggan 89–90).

(6) Tuntutan plaintif-plaintif untuk ganti rugi teruk adalah wajar dan mahkamah berpendapat bahawa RM80,000 adalah jumlah yang munasabah untuk diberikan. D2 bukan sahaja mengabaikan surat plaintif untuk meninggalkan tanah tersebut tetapi terus menceroboh, menyebabkan kerosakan kepada tanah itu dan menjadikannya mustahil untuk plaintif untuk menikmati kenikmatan tanah secara aman dan tenang. Plaintif-plaintif juga telah dilucutkan hak penggunaan tanah mereka kerana perbuatan D2 yang didorong oleh ganjaran ekonomi dan keuntungan komersial. D2 telah bertindak melampau, tidak endah dan bersikap menindas tanpa mengambil kira perasan plaintif-plaintif atau hak perlembagaan mereka (lihat perenggan 94–95).]

Cases referred to

Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Caparo Industries Plc v Dickman and others [1990] 2 AC 605, HL (refd)
Government of Malaysia & Anor v Akasah bin Ahad [1986] 1 MLJ 396, SC (distd)
PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)
Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] MLJU 554; [2013] 6 CLJ 958, CA (refd)

A *Spektra Segmen Sdn Bhd v TC Autoworld Sdn Bhd* [2018] MLJU 819; [2018] 1 LNS 880, HC (refd)
Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd [2019] 1 MLJ 1, FC (refd)
Villa Putra Management Corp v Mayland View Sdn Bhd [2015] 9 MLJ 779, HC
B (refd)

Legislation referred to

Evidence Act 1950 ss 60(1), 101, 102, 103, 106, 114(g)
Government Proceedings Act 1956 ss 7(3), 38
C Licensed Land Surveyors Act 1958

Norliza Rasool Khan (with Janice and Deyvinah Ganesalingam) (Liza Khan & Chambers) for the plaintiff.
R Kengadharan (R Kengadharan & Co) for the second defendant.
D

Julie Lack J:

INTRODUCTION

E **[1]** The plaintiffs instituted proceedings against the first, second and third defendants for breach of their duty of care, negligence and for trespass onto the plaintiffs' land in Tampin Negeri Sembilan resulting in damage and losses suffered.

F **[2]** The case against the first and third defendants were struck out on 12 February 2019, leaving only this claim against the second defendant set for trial.

G **[3]** At the conclusion of trial, I found that the plaintiffs had succeeded in proving their case against the second defendant on a balance of probabilities and I allowed their claim with costs. The second defendant is aggrieved with that decision and have filed an appeal to the Court of Appeal.

H **[4]** Here are the grounds of my judgement.

THE PARTIES AND THE BACKGROUND FACTS

I **[5]** The plaintiffs are the legal and beneficial owners of a piece of land known as TM 552, and with an address for service at No 50, Kampung Tampin Tengah, 7300 Tampin, Negeri Sembilan Darul Khusus. At all material times, the land is utilized as an orchard where coconut and banana trees are grown.

[6] The first defendant is a department under the Ministry of Energy, Green Technology and Water and was awarded a project known as 'Projek Cadangan Menaiktaraf dan Rasionalisasi Loji-Loji Sedia Ada di Kawasan Tadahan Tampin Tengah, Negeri Sembilan' ('the project'). A

[7] By a contract entered into between the first defendant and the second defendant, the first defendant appointed the second defendant as the main contractor for the project in particular to carry out works on, inter alia, the land having site possession date from 2 January 2014 and it was schedules to be completed by 2 July 2016. B C

[8] At all material times the third defendant was and/or is the consultant of the project appointed by the first defendant to oversee the works.

[9] Sometime in March 2015 the second defendant approached the plaintiff seeking consent from the plaintiffs to enter into a portion of the land adjacent to the main road to carry out the works for the period of approximately three months. D

[10] The second defendant followed up with a letter dated 16 March 2015 to the first plaintiff seeking consent of the plaintiffs to carry out the works and paid a sum of RM500 as rental for the land. E

[11] Sometime in January 2016 the plaintiffs discovered that: F

(a) the second defendant had entered on the land and dug a manhole thereon measuring 10 x 10 feet and approximately 20 feet deep;

(b) the second defendant had destroyed the trees and vegetation on the land in particular the fruit trees growing thereon;

(c) the second defendant through its servants and/or agents and/or employees had drained water out of the manhole onto the land thereby flooding the land and destroying the trees thereon; G

(d) the works carried out by the second defendant was and/or is not completed and abandon; H

(e) the second defendant had not removed its equipment and/or items from the land; and

(f) the soil removed from the manhole has eroded and flowed into the drainage on the land thereby clogging the drains in the land which further causes flooding in the land. I

[12] The first plaintiff lodged several police reports against the second defendant. They followed that up with a letter to the second defendant dated

2 February 2016 informing the second defendant about the condition of the land and the abandoned works including the manhole left uncovered. In this letter the plaintiffs notified the second defendant that:

(a) the consent by the plaintiffs for the second defendant to enter the land to carry out the works is withdrawn;

(b) any works carried out on the land without the consent of the plaintiffs will be deemed as trespass; and

(c) the second defendant was given 14 days to remedy and/or reinstate the land including to cover the manhole.

[13] The second defendant failed/refuse and/or omitted to comply with the said notice.

[14] The first plaintiff then wrote a letter dated 30 May 2016 to the first defendant notifying the first defendant regarding the police reports and the notice contained in the letter dated 2 February 2016 to the second defendant and demanded that if the first defendant did not ensure that the land is reinstated and/or remedied, the plaintiffs will take legal action against both the first and second defendants.

[15] The second defendant wrote to the first plaintiff on 10 June 2016 seeking time until 31 October 2016 to complete the works and to remedy the land and/or offered compensation of RM5,000 to the plaintiffs.

[16] The first plaintiff replied via their solicitors letter dated 17 June 2016 informing the second defendant that they were not agreeable to the second defendant's request to enter upon the land to complete the works and any entry thereon would be deemed as trespass. The plaintiffs further claimed damages of RM100,000.

[17] To their dismay the plaintiffs discovered sometime in July 2016 that the second defendant had not heeded the plaintiffs notice but had trespassed on the land and attempted to complete the works. As such by a letter dated 13 July 2016 to the first defendant, the plaintiffs notified the first defendant of the trespass by the second defendant. The plaintiffs also notified the first defendant of its negligence in failing to monitor the works by the second defendant and demanded that the first defendant take steps to ensure that the second defendant stop all works on the land, remove its equipment, cover the manhole, reinstate the land, quit possession of the land and to pay compensation for the damages in the land.

[18] As there was no response from the first defendant, the plaintiffs sent them a reminder letter dated 15 July 2016.

[19] The second defendant wrote to the plaintiffs' solicitors and clarified that the proposed manhole will not be sited on the land but that the excavated area was for temporary works for pipe jacking method only, In the same letter the second defendant proposed payment of damages of RM10,000 and rental of RM2,500 per month from August 2016 to September 2016.

[20] Via email dated 8 August 2016 from the plaintiffs' solicitors to the second defendant the plaintiffs counter proposed, inter alia, as follows:

(a) one lump sum payment of RM10,000 as damages;

(b) the proposed rental rate is to be calculated from 16 March 2015 until the works are completed;

(c) offer of RM2,500 per month until end of the project; and

(d) arrears from 16 March 2015 until 29 July 2016 amounting to RM40,000 shall be paid immediately.

[21] The second defendant did not accept the counter proposal.

[22] The plaintiffs' solicitor once again wrote a letter dated 9 January 2017 to the first defendant demanding for damages but there has been no reply received.

THE PLAINTIFFS' CLAIM

[23] As highlighted earlier the plaintiffs' claim against the second defendant is for breach of duty of care, negligence and trespass.

[24] In para 19 of the amended statement the plaintiffs particularized the manner of trespass allegedly committed by the second defendant. It was contended that the second defendant had:

(a) entered onto the land including on 10 June 2016 to carry out works despite the plaintiffs having withdrawn their consent by way of a letter dated 12 February 2016;

(b) attempted to carry out works on the land despite the first plaintiff having withdrawn her consent for it; and

(c) failed to remove their machinery and equipment from the land until to date.

[25] The plaintiffs further set out the duties owed by the second defendant jointly and/or severally with the first and third defendants as pleaded in para 26 of the amended statement of claim. In particular the second defendant had:

(a) the duty to ensure that the works carried out by the second defendant were in a timely manner and duly completed;

(b) the duty to ensure that in carrying out the works, due care is taken to ensure the safety of the land in particular that there is no hazard posed to the plaintiffs and/or occupants and visitors to the land;

(c) the duty to ensure that in carrying out the works, no damage is occasioned to the land including to ensure that there is no flooding or unnecessary destruction of plants and vegetation thereon;

(d) the duty to ensure that any trench thereon is properly hoarded and/or covered to prevent any accidents and harm to any occupiers and/or visitors thereon;

(e) the duty to ensure that any trench dug is duly covered upon completion of the works;

(f) the duty to ensure that the works are not abandoned;

(g) the duty to ensure that machineries and equipment brought onto the land is monitored and kept safe and duly removed upon completion of the works;

(h) the duty to ensure that their agents and/or servants do not enter the land except for the purpose authorized to carry out the works; and

(i) the duty to prevent any trespass on the land by its agents and/or servants upon retraction of the consent to enter the land.

[26] As a result of breaching all of the above duties the plaintiffs claim that they have suffered losses and damage.

[27] In this claim the plaintiffs are seeking the following reliefs against the defendants jointly and/or severally:

(a) a declaration that the second defendant owed the plaintiffs a duty of care to ensure that in carrying out the works, the land is maintained and kept in a safe condition in particular to ensure that any manhole thereon is properly filled up and/or covered to prevent any accidents and harm to any occupiers and/or visitors thereon;

(b) a declaration that the second defendant had trespassed onto the land;

(c) an order that the second defendant take immediate steps to quit and vacate the land;

(d) an order that the second defendant whether through its agents, servants and/or otherwise is restrained from entering onto the land to carry out the works or for any purpose whatsoever without the consent of the plaintiffs in writing;

(e) general damages to be assessed; and

(f) aggravated damages due to trespass, nuisance and/or other opportunity loss of RM1m and/or to be assessed by this honourable court.

SUMMARY OF THE SECOND DEFENDANT'S DEFENCE

[28] The second defendant has denied that it had committed trespass, nuisance or breached its duty of care to the plaintiffs. The essence of its defence is that:

(i) the plaintiffs' writ and statement of claim dated 12 July 2018 do not disclose a reasonable cause of action and lacked particulars;

(ii) the claim is barred pursuant to s 38 of the Government Proceedings Act 1956;

(iii) the second defendant was appointed by the third defendant and as such they were bound by the instructions given to them by the third defendant;

(iv) the second defendant was also bound by the instructions of the first defendant;

(v) by reason of (iii) and (iv) the second defendant cannot be held liable for breach of duty and trespass of the excavation on the plaintiffs' land;

(vi) the losses claimed by the plaintiffs were outrageous and were not due to the works carried out by the second defendant; and

(vii) the plaintiffs failed to give notice of trespass before bringing this civil suit against the second defendant.

THE TRIAL

[29] The trial of the claim was conducted over seven days via the Zoom video teleconferencing platform. The plaintiffs called five witnesses, and the second defendant called one witness. The plaintiffs' witnesses were the first plaintiff (PW1), her brother (PW3), a licensed surveyor (PW2) and two independent contractors (PW4 and PW5).

[30] The second defendant's sole witness was Mr Logamurthy a/l Murugiah (DW1).

ISSUES TO BE TRIED

[31] These were the agreed issues to be tried.

(a) whether at all material times, the second defendant as the main contractor appointed by the first defendant to carry out the works under the contract merely acted on the instructions of the first and third defendants;

(b) whether on the facts and circumstances of this matter, the second defendant owes the plaintiffs a duty of care;

(c) whether the second defendant breached that duty of care owed to the defendant if any;

(d) whether the second defendant had trespassed on the land/the property and the extend of the trespass if any; and

(e) quantum of damages

DECISION OF THE COURT

[32] It is trite law that he who alleges must prove and in a civil case the standard of the burden of proof is on the balance of probabilities. Hence in the instant case it is the plaintiffs who bear the burden of proving negligence and the onus will only shift from the plaintiffs to the defendant to rebut by evidence once the plaintiffs succeeds in discharging its burden to prove (see ss 101, 102, 103 and 106 of the Evidence Act 1950). If the plaintiffs fail to prove, the action must fail.

NEGLIGENCE/DUTY OF CARE

[33] The applicable law when dealing with allegations of a breach of duty of care and skill and negligence is trite. Three things must be proved to support the plaintiffs' claim:

(a) that the second defendant owes the plaintiff a duty of care;

(b) that the second defendant is in breach of that duty of care; and

(c) that the plaintiffs suffered damage as a result of that breach of duty and that damage is not too remote.

[34] In the case of Projek *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] MLJU 554; [2013] 6 CLJ 958 the Court of Appeal very capably explained the tort of negligence as follows:

> [68] According to Alderson B in *Blyth v The Company of Proprietors of the Birmingham Waterworks* [1856] 11 Ex 781, 784:

> Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.

[70] The *Caparo* test derived from the case of *Caparo Industries Plc v Dickman and Others* [1990] 2 AC 605 is usually applied to cases involving physical injury and/or damage to property. The *Caparo* test requires the court to ask three basic questions:

(a) Whether the damage is reasonably foreseeable?

(b) Whether there is a relationship of proximity between the claimant plaintiff and the defendant?

(c) Whether it is just, fair and reasonable to impose a duty in such a situation?

Whether the second defendant owes a duty of care to the plaintiffs

[35] The plaintiffs have clearly pleaded via para 8 of the amended statement of claim that the second defendant was appointed by the first defendant as the main contractor of the project, in particular to carry out the work required and that the project was for the benefit of the public.

[36] The first plaintiff (PW1) and her brother, Encik Roshdan (PW3) gave oral evidence testifying to the fact that sometime in March 2015, the second defendant's employee/servant/agent one Encik Izham came to see her seeking permission to use a portion of the plaintiffs' land for a period of three months with regard to the use of the plaintiffs' land to carry out the project and to place their machineries. The second defendant followed that up with their letter dated 16 March 2015 for the same purpose. Paragraph 3 of the letter dated 16 March 2015 refers to the amount of rental the second defendant agreed to pay the plaintiffs. Paragraph 3 of the said letter is reproduced below:

> Projek Pembentungan sepenuhnya milik Kerajaan Malaysia ini dijangka mengambil masa selama 3 (TIGA) bulan, bergantung kepada keadaan semasa dan tertakluk kepada pindaan. Namun pihak kami dengan segala initiative akan cuba menyiapkan projek ini dalam tempoh yang lebih singkat dan *berjanji akan membaiki segala kerosakan berkaitan yang mungkin akan berlaku di sekitar kawasan tanah milik tuan/puan.*
>
> *Bersama ini disertakan bayaran sewa tanah berjumlah RM500.00 (Lima Ratus Ringgit Malaysia).* (Emphasis added.)

[37] In the face of the contents of the above said letter, it is quite baffling that DW1, the second defendant's only witness denied any agreement to rent the plaintiffs' land. An excerpt of his evidence at pp 597 and 598 of the notes of proceeding is reproduced below:

PP: Dan surat ini Encik Loga diberi kepada Puan Nauran secara tangan, secara peribadi, betul?

DW1: Ya.

PP: Oleh Encik Izham, betul?

DW1: Ya.

PP: Jadi pada masa Encik Izham berjumpa dengan Puan Nauran Encik Loga tidak hadir?

DW1: Ya Yang Arif.

PP: Dan jadi Encik Loga tidak tahu perbualan antara Encik Izham dengan Puan Nauran pada masa tersebut?

DW1: Tiada perbualan Yang Arif.

PP: Encik Loga tahu tak perbualan?

DW1: Tidak Yang Arif.

PP: Jadi saya cadangkan bahawa Encik Izham ada memberi jaminan kepada plaintif Pertama bahawa pampasan sewa akan diberi, betul? Saya cadangkan Encik Loga. Encik Loga setuju atau tidak?

DW1: Saya tidak setuju Yang Arif.

PP: Tapi Encik Loga tak tahu dan Encik Loga tak ada masa tersebut, betul?

DW1: Tidak Yang Arif.

PP: Encik Loga, adakah Encik Loga pernah bertemu dengan mana-mana 3 plaintif berkenaan projek ini?

DW1: Tidak Yang Arif.

PP: Tadi kan Encik Loga ada kata terdapat, sorry, boleh Encik Loga terangkan sama ada terdapat Pejabat Tapak, site office yang ditubuhkan untuk projek ini?

DW1: Ada Yang Arif.

PP: Dan adakah tapak ini di Taman Indah, Tampin?

DW1: Ya Yang Arif.

PP: Adakah Encik Loga selalu ke tapak ini?

DW1: Pejabat tapak, ya.

PP: Berapa kerap Encik Loga?

DW1: Sekiranya ada keperluan Yang Arif.

PP: Semasa Encik Loga berada di Pejabat tapak pada bila-bila masa Encik Loga setuju tak pernah jumpa atau terserempak dengan plaintif-plaintif?

DW1: Tidak Yang Arif.

[38] DW1 conceded that the three month period referred to in the said letter was for a period from 16 March 2015 to 15 June 2015.

[39] in fact, DW1 gave explicit evidence that the second defendant as the main contractor were responsible for digging up the manhole on the plaintiffs' land and also that the second defendant had the duty to remedy the manhole left on the land. His admission is found in p 626 of the notes of proceeding:

> PP: B1. Enclosure 115. Setuju Encik Loga bahawa lubang yang jelas terlihat di muka surat 267 dikorek semasa projek ini?
>
> DW1: Ya setuju.
>
> PP: Dan ianya dikorek oleh Defendan Kedua sebagai kontraktor?
>
> DW1: Ya.
>
> PP: Dan setuju jika saya cadangkan bahawa adalah tanggungjawab Defendan Kedua untuk memperbaiki lubang ini?
>
> DW1: Ya setuju.

[40] From the facts and the evidence adduced, I am satisfied and I make the finding that the three principles (*Caparo* test) explained in the case of *Project Lebuh Raya Utara-Selatan* exist and are present in the instant action and have been proven by the plaintiffs on a balance of probabilities.

[41] It is the finding of this court that there is proximity of relationship between the two parties whereby the second defendant admitted that they had sought permission to use the plaintiffs' land for a period of three months and they had proceeded to carry out the works within the boundary of the plaintiffs' land.

[42] In consequence of that this court finds that the proximity of the relationship between the plaintiffs and the second defendant led to the irrefutable conclusion that the acts of the second defendant would cause damage to the plaintiffs. It was a foreseeable occurrence in that the second defendants knew that they could not and ought not dig into the plaintiffs' land and that such act would inevitably cause damage and direct loss to the plaintiffs as a private land owner.

[43] The second defendant's main subsidiary contention is that it cannot be held liable for any alleged losses suffered by the plaintiffs. The defendant maintained the position that since the project was undertaken for the benefit for the public and was carried out on the instructions of the first and third defendants, it cannot be held responsible for the plaintiffs' woes.

[44] It is imperative to note that the second defendant had not for the duration of the trial produced its contract with the third defendant to show that the second defendant was bound by instructions of the third defendant. The second defendant also could not show that the works carried out were for

the public interest and that they were bound to carry out the works in accordance with the plan given to them by the third defendant. The second defendant failed to show that the design and drawings pertaining to the project were imposed upon them to comply with. The second defendant also failed to show proof that they were instructed by the third defendant to enter into the plaintiffs' land in order to carry out and complete the project. In the absence of all of the above the second defendant cannot now avoid liability and hide behind their bare allegation that the works were for public interest or that it was in accordance with the instructions of the third defendant. In the absence of the design drawings and plans the second defendant offered no cogent evidence that the digging on the plaintiffs' land was in accordance with the instructions and directions of the third defendant.

[45] The second defendant's other subsidiary defence was that the works it carried out is a government project and as such is caught under s 38 of the Government Proceedings Act 1956. It is clear as day that the second defendant is not a government body and thus cannot lay claim to any form of immunity under the Government Proceedings Act 1956. The second defendant is a company and can be sued for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties (see s 7(3) of the Government Proceedings Act 1956).

[46] In light of all of all three ingredients of the tort of negligence being met it followed that the plaintiff has proven that the second defendant owed a duty to ensure that the works carried out were undertaken with due care to ensure the safety of the land in particular and that there is no hazard posed to the plaintiffs and its occupants and visitors to the land. More importantly it was under a duty to ensure that the works carried out were duly carried out and completed in a timely manner.

[47] It is important also for the second defendant to ensure that in carrying out the works, it incurred no damage to the land such as avoid flooding or unnecessarily destroy its plants and vegetation thereon. It had a duty to ensure that any digging resulting in a trench/hole or dug-out is covered or closed up in order to prevent any untoward accident and harm to its owners and any other persons occupying the land. It had to ensure that the land was returned to its original structure. Since the second defendant had brought machines and equipment onto the land it had the duty to remove these items upon completion of the works or upon consent being withdrawn for it to be on the land.

Whether the second defendant had breached its duty of care owed to the plaintiffs

[48] The plaintiffs have proven on a balance of probabilities that the second defendant did not complete the project within the time allocated pursuant to the contract. In the course of carrying out their work the employees and servants of the second defendant had caused flooding to the surrounding areas and had destroyed the plants and vegetation growing at the vicinity. The left an open trench which was dangerous and harmful to anyone passing through the area. The left their machineries and equipment behind even after the plaintiffs had withdrawn their consent to enter onto the land.

[49] PW1 in her evidence at pp 508 and 509 of the NOP explained the damage that was caused on the land:

PP: Boleh Puan Nauran merujuk kepada afidavit Encik Baharudin, 120? Puan Nauran jumpa? Kandungan 120, Afidavit Baharudin.

PW1: Sudah jumpa.

PP: Puan Nauran lihat muka surat 31 dalam dokumen ini. Boleh Puan Nauran jelaskan apakah yang gambar ini menunjukkan?

PW1: Gambar ini menunjukkan lubang yang telah digali tapi sudah dipenuhi oleh rumput-rumput dan pokok-pokok macam pokok belukar. Jadi tak nampak sangat, tak jelas. Memang lubang yang digali itu.

PP: Puan Nauran, Puan Nauran telah ditanya berkali-kali pada tarikh-tarikh yang Puan Nauran beri keterangan tentang perkataan-perkataan parit dan manhole serta longkang dan seterusnya.

PW1: Ya.

PP: Di mana dicadangkan kepada Puan Nauran bahawa manhole itu bukan parit. Puan Nauran ingat soalan tersebut?

PW1: Ya.

PP: Bolehkah Puan Nauran jelaskan adakah terdapat korekan atas tanah Puan Nauran?

PW1:Ada korekan. Itu tinggal lubang itu. Lubang yang sudah terbiar.

PP: Boleh Puan Nauran rujuk kepada lkatan B1 muka surat 267? Puan Nauran jumpa?

PW1: 267 jumpa.

PP: Boleh Puan Nauran jelaskan apakah gambar ini?

PW1: Gambar lubang. Gambar lubang yang digaii dan ditutup dengan kayu dan dawai. Lubang yang telah digaji.

PP: Puan Nauran, adakah ini subjek tuntutan Puan Nauran dalam kes ini?

PW1: Ya subjek.

[50] The second defendant abysmally failed to rebut the plaintiffs' evidence on this issue. To compound matters, DW1 admitted in his evidence that he had never visited the lands after the project started. Therefore his denial of any

excavation on the land is baseless and must be disregarded in entirety. His admission is found in p 575 and 576 of the NOP and reproduced here for easy reference:

PP: Selain daripada tadi Encik Loga kata pernah ke tanah tersebut sebelum projek itu bermula, selain daripada itu ada pernah jelajahi tanah 31 tersebut?

DW1: Tidak Yang Arif.

PP: Selain daripada tadi Encik Loga kata pernah ke tanah tersebut sebelum projek itu bermula, selain daripada itu ada pernah jelajahi tanah tersebut?

DW1: Tidak Yang Arif.

[51] DW1 agreed with the learned counsel for the plaintiffs when she challenged him that the plans were not followed when the second defendant's workers dug up the earth inside the plaintiffs land resulting in the manhole being created. In the plans the manhole should have been dug outside the plaintiffs' land and not inside. The admission by DW1 is found at pp 609 and 610 of the NOP and reproduced below:

PP: Kita lihat muka surat 265 to 270.

DW1: Same bundle?

PP: Bundle B1. Khususnya 267.

DW1: Gambar?

PP: Gambar. Saya cadangkan Encik Loga bahawa ini adaiah gambar lubang yang dikorek dalam tanah Plaintif-plaintif.

DW1: Ya Yang Arif.

PP: Sekarang Encik Loga di Ikatan B2, kita lihat muka surat 296. Jumpa?

DW1: Ya Yang Arif.

PP: Encik Loga, ini adalah surat daripada Pembinaan Daya Tekad Sdn Bhd, Defendan kedua Encik Loga dalam kes ini kepada Defendan Ketiga Ciptamas Consult Sdn Bhd, betul?

DW1:Ya Yang Arif.

PP: Bertarikh 15 Februari 2017. Ya? Correct the date Encik Loga?

DW1: Ya.

PP: Dan jika Encik Loga lihat muka surat 297 ditandatangani oleh Hadzlee Auli.

DW1: Ya Yang Arif.

PP: Adakah Encik Loga mempunyai pengetahuan peribadi, personal knowledge, tentang surat ini?

DW1:Ya Yang Arif.

PP: Dan Encik Loga terlibat dalam penyediaan surat ini?

DW1: Ya Yang Arif.

PP: Lihat kepada perenggan pertama. Before that, surat ini Encik Loga dalam header, dalam tajuk surat ini projek yang dirujuk adalah projek dalam kes ini Encik Loga, betul?

DW1: Ya.

PP: Dan kontrak pun kontrak dalam kes ini, betul?

DW1: Ya Yang Arif.

PP: Dan construction of MH-2-36B adalah manhole yang sepatutnya sebeiah tanah plaintif-plaintif, betul?

DW1: Ya Yang Arif.

PP: Di perenggan pertama Encik Loga setuju bahawa surat ini menyatakan bahawa Defendan Kedua telah meneliti location pit tersebut dan mendapati bahawa pit yang dirujuk sebagai MH-26B is indeed located 26 within the private property of the owner Puan Nauran binti Abdul Majid. Correct it says that Encik Loga? Betul?

DW1: Ya Yang Arif.

All the more compelling is the evidence of DW1 as follows:

PP: Jadi bila anda melihat gambar ini Encik Loga di muka surat 267, 4 gambar yang pertama di atas, setuju jika saya katakan sekiranya terdapat hujan lebat lubang ini akan dipenuhi air?

DW1: Setuju.

PP: Dan air tersebut boleh melimpah ke kawasan sekelilingnya, setuju Encik Loga?

DW1: Tidak setuju.

PP: Tidak setuju. Jadi air tersebut akan mengalir ke mana Encik Loga ?

DW1: Boleh saya beri penjelasan Yang Arif sebab ini meiibatkan teknikal?

YA: Ya.

DW1: Di dalam pit yang dikorek, pit adalah satu struktur sementara, di dalam pit yang dikorek terdapat drainage sump, sump longkang yang kita menggunakan pam. Sekiranya air melebihi tahap ke dalam air tersebut akan secara automatik akan dipam keluarke parit berhampiran sebab kalau air tertakung tinggiia akan merosakkan mesin yang berada di dalam pit tersebut dan tidak dapat menjalankan kerja-kerja pemasangan.

PP: Ok, soalan saya yang seterusnya Encik Loga, parit yang berdekatan dengan pit ini adalah parit yang Encik Loga tunjuk tadi dalam tanah Plaintif-plaintif?

DW1: Ya.

PP: Parit di tengah-tengah.

DW1: Ya.

PP: Jadi air akan diparn keluar dan dibuang ke dalam parit yang berada 5 dalam tanah Plaintif-plaintif, setuju?

DW1: Parit milik JPS di tanah plaintif. Parit itu adalah milik JPS, kerajaan.

[52] Earlier in his testimony DW1 did not dispute that the manhole had been excavated by the second defendant. His evidence leaves no room for doubt:

> PP: B1. Enclosure 115. Setuju Encik Loga bahawa lubang yang jelas terlihat di muka surat 267 dikorek semasa projek ini?
>
> DW1: Ya setuju.
>
> PP: Dan ianya dikorek oleh Defendan Kedua sebagai kontraktor?
>
> DW1: Ya.
>
> PP: Dan setuju jika saya cadangkan bahawa adalah tanggungjawab Defendan Kedua untuk memperbaiki lubang ini?
>
> DW1: Ya setuju.
>
> PP: Setuju jika saya cadangkan bahawa tidak ada langkah diambil oleh Defendan Kedua untuk menimbun atau menutup lubang ini?
>
> DW1: Tidak.
>
> PP: Encik Loga tidak setuju tapi ada gambar menunjukkan sudah ditembus?
>
> DW1: Tiada arahan.
>
> PP: Jadi Encik Loga tidak tahu sebenarnya.

[53] It is clearly evident that DW1 did not deny the breach except to justify the second defendant's actions in following the instructions of the first and third defendants, In my view this defence has remained unproven.

[54] Having perused the contemporaneous documents and the evidence of the witnesses I am compelled to hold that the second defendant was aware and had full knowledge that they had not obtained the consent of the plaintiffs' before digging the manhole inside of the plaintiffs' land. DW1 confirmed that the minutes of meeting (pp 382–406 B2) signed off by their employee showed that the manhole was dug in the plaintiffs' land without the plaintiffs' consent and the hole has not been covered to date. The issue of the manhole again came up in a letter dated 15 May 2018 (p 303 B2) between the second and the third defendant. Reference is made to para 2 of the said letter which reads as follows:

> *We are fully aware of the situation of the existing manhole pit which is located at the private lot* and the issue surrounding the requirement of having the manhole relocated. We have also had several discussions with your previous resident engineer and your project engineer on having to shift the pit and manhole location due to the issue.

[55] Most undoubtedly the second defendant had excavated in the plaintiff's land and had dug out the manhole as seen in the photographs tendered into court. As such the court is firmly of the view that all these contemporaneous

documents together with the evidence of DW1 show beyond doubt that there was a breach of duty on the part of the second defendant and they had failed to take steps to remedy the breach.

[56] During the course of the trial, concerns were raised as to whether the 'hole' excavated on the plaintiffs' land was to be described as a 'manhole', a 'pit' or a 'trench'. In my view this wordplay bore no detrimental consequence to the plaintiffs' case as all parties were aware and not confused nor misled in regard to that fact. There is no prejudice occasioned by the usage of the words to describe the hole within the plaintiffs' land. Given the circumstances I find that the plaintiffs had pleaded accordingly and had not exceeded the bounds of pleadings in the amended statement of claim.

[57] In fact DW1 had conceded that there was indeed a 'hole' that was dug on the land by the second defendant and that the hole remains todate. I have also noted that the words 'pit' and 'manhole' have been referred to interchangeably by the plaintiffs and the defendants alike via their oral testimonies and letters. I find there was no prejudice caused to the second defendant by the use of the words to describe the hole excavated.

[58] Having carefully considered and weighed both the oral and documentary evidence adduced by the parties, it is the finding of this court that the vital ingredients for breach of duty of care and negligence has been made out and unrebutted by the second defendant.

Whether the second defendant had trespassed on the plaintiffs' land

[59] Every unlawful entry by a person on land in the possession of another is a trespass for which an action lies. The elements to establish the tort of trespass has been clearly stated in the Federal Court case of *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2019] 1 MLJ 1 as follows:

(a) entering upon land in the possession of the plaintiff;

(b) remaining upon such land; or

(c) placing or projecting any object on or over it, in each case without lawful justification.

[60] The Federal Court defined trespass in this manner:

> [21] Before we dwell on the issue raised by learned counsel for the appellant, it would be useful to briefly state the law on trespass. *Halsbury's Laws of England* (4th Ed) Vol 45 gives a definition of trespass under the head of 'Wrongs to Property' at para 1384 at p 63: Unlawful Entry. Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides

A or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been B collected by him on his own onto another's land.

[61] In *Spektra Segmen Sdn Bhd v TC Autoworld Sdn Bhd* [2018] MLJU 819; [2018] 1 LNS 880 it was observed that it would be 'wrong to assume that no one can be liable for trespass unless he has notice that he is trespassing'. The C court went so far as to hold that the trespasser is liable even when he does not know that he is trespassing or that he does not know he has no right in law to be there.

D **[62]** The plaintiffs' case for trespass has been pleaded and can be seen from the facts pleaded in paras 19–21 of the amended SOC which are reproduced below:

19. However, in or about July 2016 and based on the construction plan provided by the second defendant, the plaintiffs discovered that the second defendant had E trespassed on the Land and attempted to complete the Works.

Particulars of Trespass by the second defendant

19.1 entered the Land including on 10 June 2016 to carry out works despite the plaintiffs having withdrawn their consent by way of a letter dated 22 February 2016 F

19.2 attempted to carry out works on the Land despite consent by the first defendant being withdrawn; and

19.3 failure to remove the machinery and equipment from the Land to date.

G 20. As such, by a letter dated 13.7.2016 from the first plaintiff to the first defendant, the first plaintiff notified regarding the trespass by the second defendant. The first plaintiff also notified the first defendant of its negligence in failing to monitor the Works by the second defendant and demanded that the first defendant takes steps to ensure that the second defendant stop all works on the Land, remove its H equipment, cover the manhole, reinstate the Land, quit possession of the Land and to pay compensation for the damages in the Land.

21. As there was no response from the first defendant, the first plaintiff sent a reminder letter dated 15.7.2016 to the 1 st defendant.

I **[63]** The trespass by the second defendant has been proven by the following evidence:

(a) PW4, a subpoena witness gave uncontroverted evidence that he saw a hole in the plaintiffs' land when he conducted a survey at the location;

(b) DW1 testified that the second defendant's workers had entered into the plaintiffs' land prior to the commencement of the project without first obtaining consent from the owners;

(c) DW1 confirmed that the minutes of several meetings dating back from 2016 up to 2018 (pp 382–406 B2) in which the second defendant took part of showed that the manhole was dug inside of the plaintiffs' land without the plaintiffs' consent and the hole had not been covered todate;

(d) the issue of the manhole is also found in the letter between the second and third defendant dated 15 May 2018 (pp 303–304 B2); and

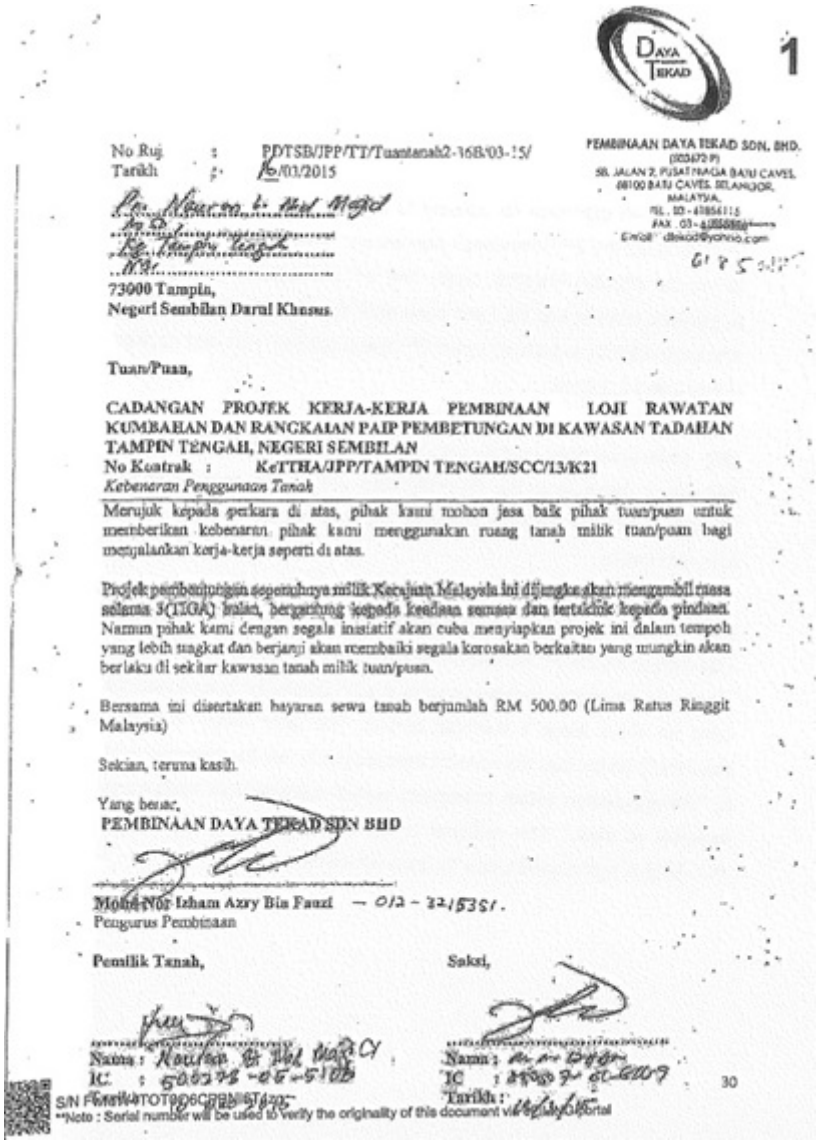
(e) DW1 admitted that the machinery was kept on the plaintiffs' land for the duration of the project but claimed that the workers had removed the machinery thereafter. The plaintiffs refuted DW1's testimony and stated that there were still remnants of the equipment such as the sheet piles left behind. There is no evidence to substantiate the second defendant's assertion. It is noticeable that DW1 could not confirm with certainty that all the machinery and sheet piles had been removed as he had never been to the land. Since the second defendant failed to offer any assertive evidence of the same and could not provide any documentary evidence in regard to its removal, that evidence remains as hearsay evidence and no weight will be given to it.

[64] Consequently this court finds that the plaintiffs' claim for trespass starting from 16 June 2015 (after the expiry of three months expressly stated in the plaintiffs' letter to the second defendant dated 16 March 2015) had been made out. The court further finds that the second defendant did not make any request for an extension for consent to access the plaintiffs' land post 16 June 2015 but the second defendant's workers and employees still continued to intrude into the plaintiffs' land. The second defendant's workers and employees entered into the land even after the plaintiffs had expressly withdrawn their consent to allow the second defendant onto the land via their notice dated 2 February 2016.

[65] Quite apart from entering onto the plaintiffs' land the second defendant had dug a manhole in the plaintiffs' land without the consent of the plaintiffs. From the evidence tendered the manhole still remains on the land until todate,

[66] It is worth noting that the consent given from 16 March 2015 to 15 June 2015 was merely for the second defendant to store their machinery on the land. There was never any consent given to the second defendant to excavate the land let alone leave a manhole behind. The letter dated 16 March 2015 specifically states that the consent was sought to use the plaintiffs' land to

'menggunakan tanah tuan/puan untuk menjalankan kerja-kerja tersebut di atas'. The contents of the second defendant's letter dated 16 March 2015 is reproduced below for easy reference:



PEMBINAAN DAYA TEKAD SDN. BHD.
(925672-P)
SB. JALAN 2, PUSAT PERNIAGA BATU CAVES,
68100 BATU CAVES, SELANGOR,
MALAYSIA.
TEL : 03-41856115
FAX : 03-41856116
Email : dtekad@yahoo.com

No Ruj. : PDTSB/JPP/TT/Tuantanah2-16B/03-15/
Tarikh : 16/03/2015

Pn. Nauran bt Abd Majid
No 1, Jalan Tampin Tengah
Off
73000 Tampin,
Negeri Sembilan Darul Khusus.

Tuan/Puan,

CADANGAN PROJEK KERJA-KERJA PEMBINAAN LOJI RAWATAN KUMBAHAN DAN RANGKAIAN PAIP PEMBETUNGAN DI KAWASAN TADAHAN TAMPIN TENGAH, NEGERI SEMBILAN
No Kontrak : KeTTHA/JPP/TAMPIN TENGAH/SCC/13/K21
Kebenaran Penggunaan Tanah

Merujuk kepada perkara di atas, pihak kami memohon jasa baik pihak tuan/puan untuk memberikan kebenaran pihak kami menggunakan ruang tanah milik tuan/puan bagi menjalankan kerja-kerja seperti di atas.

Projek pembentungan sepenuhnya milik Kerajaan Malaysia ini dijangka akan mengambil masa selama 3(TIGA) bulan, bergantung kepada keadaan semasa dan tertakluk kepada pindaan. Namun pihak kami dengan segala inisiatif akan cuba menyiapkan projek ini dalam tempoh yang lebih singkat dan berjanji akan membaiki segala kerosakan berkaitan yang mungkin akan berlaku di sekitar kawasan tanah milik tuan/puan.

Bersama ini disertakan bayaran sewa tanah berjumlah RM 500.00 (Lima Ratus Ringgit Malaysia)

Sekian, terima kasih.

Yang benar,
PEMBINAAN DAYA TEKAD SDN BHD

Mohd Nor Izham Azry Bin Fauzi – 012-3215351.
Pengurus Pembinaan

Pemilik Tanah,
Nama : Nauran Bt Abd Majid
IC : 500328-05-5108

Saksi,
Nama : Mohd Nor Izham Azry Bin Fauzi
IC : 870907-01-6009
Tarikh : 16/3/2015

30

S/N: FWATOTOOCPBMST205
**Note : Serial number will be used to verify the originality of this document via MyEG portal

[67] The second defendant knew that they were not supposed to excavate the manhole inside of the plaintiffs' land. This is substantiated by the plans issued by the third defendant of the works. The plans found in p 271 B2 shows that the manhole was to be located outside the boundary of the plaintiffs' land. This

is borne out by the minutes of the meeting (pp 382–406 B2) in which the second defendant was directed to rectify their mistake.

[68] The evidence of PW2 in regard to his survey report dated 14 December 2017 (p 561 B3) further confirmed that the manhole is within the boundary of the plaintiffs' land based on the coordinates of the land as stated in the land title. The second defendant should not be allowed to challenge the evidence of PW2 merely because he did not bring along his license during the trial. This court is satisfied from his evidence that he had personal knowledge of the contents of the survey report as he and his staff had examined and discussed the minutes and field notes first before preparing the survey report. I accept his explanation that the survey that he carried out was not a title survey and as such did not fall within the ambit of the Licensed Land Surveyors Act 1958.

[69] Returning to the pivotal question, it must not be forgotten that the second defendant's own defence showed that they did not deny the trespass safe to say that it is carried out in the public interest. As I have highlighted earlier there is no dispute that the plaintiffs' are the owners of this land, Hence the second defendant's reference and use of the case of *Government of Malaysia & Anor v Akasah bin Ahad* [1986] 1 MLJ 396 is without merit. What distinguishes the instant case with the case of *Akasah* is that the respondent (Akasah) did not own the land in question whereas the plaintiffs are the registered owners of theirs. I reiterate here that the plaintiffs' earlier consent given to the second defendant was expressly revoked by their letter dated 2 February 2016.

[70] The second defendant has raised the contention that the presence of a stream on the land was a matter that involved the Department of Irrigation and Sewage and reminded the plaintiffs that the right of way enjoyed by the second defendant is not a gratuitous license nor a contractual license. This contention was not pleaded nor proven by the second defendant. The unvarnished truth is that the plaintiffs are legal and registered owners of the land and have exclusive enjoyment of the land and the second defendant could not bring forth any evidence to show that the plaintiffs had consented to the digging of the manhole or to damage and destroy the land. Nothing can override the documentary evidence which showed that the second defendant was directed by the other defendants to carry out remedial works on the damage caused to the plaintiffs' land.

[71] I find taking into consideration all of the above factors that there is incontrovertible evidence from the oral and documentary evidence the second defendant had trespassed onto the plaintiffs' land with impunity. The trespass has continued from 16 March 2015 unabated until todate.

[72] I am wholly in agreement with the plaintiffs' submission that an adverse inference should be drawn against the second defendant pursuant to s 114(g) of the Evidence Act 1950 for the failure to produce a number of key individuals who were directly involved in their dealings with PW1 and PW3 in regard to the land. None of the witnesses who were involved in meeting and discussing the matter with PW1 and PW3 were called to give evidence. They were Balamurugan Ramasamy, Izham, Hadzlee Auli b Mohd Nadzir, Mohd Nadzir b Mansor, Pong Kok Chooi and Louis De Cruz to name a few, These individuals are the best witnesses to shed light on the dispute and the circumstances leading to it. They could have cieared any doubt whether there was an oral conversation in regard to the use of the plaintiffs' land and compensation for the same. These witnesses are material to the facts of the present case and could have lent credence to the second defendant's narrative. The second defendant did not proffer any reasons for the non-calling of these material witnesses. I can only surmise that these individuals if called would have given evidence not in favour of the second defendant.

[73] Before I depart this subject, I wish to record my findings on the second defendant's sole witness in this proceedings.

[74] I found DW1 to be not a helpful witness for the second defendant. From my assessment of his evidence on the witness stand, I found that he did not have personal knowledge of this claim brought by the plaintiffs. He had never met the plaintiffs and neither did he have any personal interaction with the plaintiffs at the material time. He did not have personal knowledge of the matters of the evidence he gave at the trial. Truth be told he is not an employee, director or a shareholder of the second defendant. He is the director of Visi Nusajaya Sdn Bhd, a contractor appointed by the second defendant. He had no personal knowledge of the matters relating to the second defendant. He truthfully stated that he had no knowledge of the affairs of the second defendant and had no connection whatsoever to the second defendant. This evidence is found at p 562 of the NOE reproduced here as follows:

> PP: Jadi betul tak jika saya katakan Encik Loga bahawa Encik Loga tiada pengetahuan peribadi tentang perkara-perkara yang melibatkan syarikat Pembinaan Daya Tekad Sdn Bhd?
>
> DW1: Tidak Yang Arif
>
> ...
>
> PP: Tiada, terima kasih Encik Loga. Betul Encik Loga jika saya katakan Encik Loga tiada kaitan dengan Pembinaan Daya Tekad sebagai Direcktor atau pun pemegang saham?
>
> DW1: Ya Yang Arif.

[75] DW1 never took part in all the meetings held by the second defendant and he did not visit the land when the dispute was ongoing. His evidence at its best is hearsay and is in admissible as it contravenes s 60(1) of the Evidence Act 1950.

[76] All things considered it is the view of this court that even without any adverse inference as aforesaid, the other evidence adduced has established a sufficient case of negligence and trespass against the second defendant.

[77] Having carefully weighed the oral and documentary evidence adduced by parties and considered the written submissions as well as the authorities filed therein it is my considered view that the plaintiffs have proven their pleaded case on a balance of probabilities against the second defendant. I reject the second defendant's defence finding it devoid of merits interspersed with bare assertions and afterthoughts.

QUANTUM OF DAMAGES

[78] This finally brings us to the issue of loss and damage. The plaintiffs assert that they have suffered losses and damage and have set out in paragraph 30 of their amended SOC the particulars thereof:

No	Items	Amount (RM)
1.	Cost of rectification works	265,000
2.	Surveying cost	3,180
3.	Loss of rental @ RM2,500 per month from June 2015 to June 2018 (three months)	90,000
4.	Loss of vegetation and damage due to flooding	10,000
5.	Damages for trespass	100,000
6	Legal Fees	36,000
	Total	504,180

[79] In any claim for damages the person seeking a claim has the burden of proving both the facts and the amount of damages before he can recover them (see *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681).

[80] It is trite that it is the duty of the plaintiffs to prove their losses. 'It is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it' (*Bonham Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178). The damages must be proven with factual evidence. No amount of estimates or general conclusions will suffice.

[81] Be that as it may the court takes note that damages need not be proven

for a claim in trespass. In *Villa Putra Management Corp v Mayland View Sdn Bhd* [2015] 9 MLJ 779 the court reiterated the principle that the tort of trespass to land is a tort which is actionable per se and that damages need not be proven for the tort to be made out.

[82] In this regard the plaintiffs led evidence of the losses suffered as a result of the second defendant's negligence and trespass on the land through PW1.

[83] The second defendant had left a gaping manhole in the ground and they left without filling it up. The area where the second defendant chose to set up their workstation is an orchard where various fruit trees are grown and cultivated. PW1 alleged that the second defendant had chopped off two coconut trees and three banana trees that were laden with fruits in order to dig the manhole. PW1 also realized that the second defendant's workers had pumped water out of the manhole and flooded the surrounding land which caused the area to be soggy and water logged. PW1 gave extensive evidence that a pump was placed on her land and water was pumped out of the manhole which led to the flooding. The plaintiffs filed a total of three police reports which contemporaneously documented their grievances with the actions of the second defendant as follows:

(a) ruined their fruit trees;

(b) failed to install sewerage pipes as promised resulting in residual water spilling over and flooding their orchard;

(c) discharged and disposed of pumped residual water from out of the manhole onto the ground; and

(d) caused the drain in the orchard to be clogged with rubbish and mud.

[84] PW1 in her evidence stated that the second defendant had given their assurance to her and promised to compensate the plaintiffs for the damage and loss but they had reneged on their word.

[85] The existence of the manhole situated inside of the plaintiffs' land cannot be disputed. PW2 who visited the land confirmed the existence of the hole and he included it into the survey report which he prepared. The survey report dated 14 December 2017 showed the location of the hole in question confirming that it is located within the boundary of the plaintiffs' land based on the coordinates of the land as stated in the land title.

[86] PW5, the independent contractor confirmed the existence of the manhole and further gave evidence that he saw the sheet piles lying on the plaintiffs' land. DW1 on the other hand could not confirm with certainty that

the sheet piles had been removed as he had never been to the land. DW1 agreed that the second defendant had no documentation to substantiate those denials.

[87] As it stands the evidence of DW1 as the sole witness was of no assistance to the second defendant's case as DW1 had no personal knowledge of the existence of the manhole, the condition of the land and the flooding.

[88] As it is this court is of the view that the plaintiffs have proven their claim for damages as they have shown that they were gravely affected and prejudiced by the acts of the second defendant. I am satisfied and I make the finding that the plaintiffs have proven the damages suffered even though there is scanty documentary evidence to support their assertions, I found the evidence of both the witnesses ie PW1 and PW3 to be credible and reliable. To me, from my observation of their demeanour they were honest to goodness village folk and they were unwavering and candid in their testimonies even when it was to their detriment. I preferred and believed their version of the disputed facts that occurred.

RM10,000: Loss of vegetation and damage due to flooding

[89] In this case there was no evidence shown of the extent of the damage caused to the vegetation and the land. Hence this court is of the view that while the plaintiffs have proven damage was caused, there is scarcity of the quantification of the damages. The plaintiffs claim a sum of RM10,000 for this loss. It is nevertheless the view of this court that the plaintiffs have proven the contravention of their right and for that reason nominal damages would be the most appropriate relief to be awarded. In the particular facts and circumstances of this case this court will award a nominal sum of RM2,500 for loss of vegetation and damage due to flooding.

Claim for loss of rental: RM90,000

[90] In regard to the claim for loss of rental at RM2,500 per month this court takes note of the evidence given by DW1 where he confirmed that RM2500 per month was offered to the plaintiffs as rental for using the plaintiffs' land and as such that sum will be accepted as the amount payable for trespass of the land. It is a justified sum and not a sum plucked out of the air. The court allows the claim for loss of rental at RM2,500 per month from June 2015 to June 2018 which is a period of 36 months altogether which brings it to a total of RM190,000.

Cost of rectification: RM265,000

[91] The plaintiff sought the sum of RM265,000 being cost of rectification works. This amount is based on a quotation provided by PW5, a private and independent contractor. The quotation is at p 324 B2 and marked as exh P5. In my view the plaintiffs have provided proof of the damages by producing the said quotation prepared by PW5 to support their claim for the costs of rectification. PW5 was closely cross-examined and despite that he came out unscathed. He stood his ground while under cross-examination and I am of the firm view that his reasons for charging that amount are sound and has basis. His evidence is highly probable and is consistent with logic and common sense. Thus I was convinced that the said sum is a reasonable figure in order for him to effectively remedy and rectify the damage caused and left behind by the second defendant. Hence I do not see it to be an unreasonable sum nor is it a wildly unfair figure as alleged by counsel for the second defendant.

[92] In any event the second defendant did not produce any counter quotation to rebut that claim. In the absence of rebuttal evidence it does not lie in the mouth of the second defendant to deny the plaintiffs' claim or to retort that the sum claimed is unreasonable or wildly unfair when they themselves did not produce any documentary evidence to counter that sum claimed.

Aggravated damages due to trespass

[93] The plaintiffs also sought the court's discretion to order aggravated damages against the second defendant for having caused severe detriment to the plaintiffs resulting in deprivation of the use of part of their land.

[94] I find that the plaintiffs' claim for aggravated damages is justified and warranted. The second defendant had ignored the plaintiffs' letters to them to leave the land. Not only did they ignore the revocation of the earlier consent given by the plaintiffs, the second defendant continued to flagrantly trespass onto the plaintiffs' land and caused damage to the land making it impossible for the plaintiff to enjoy peaceful and quiet enjoyment of the land. The plaintiffs were deprived of the use of part of their land until todate. The second defendant's acts were serious and deliberate, caring only for economic reward and commercial gains for themselves. Depriving the plaintiffs of the use of their land is in the realm of exceptional oppressive and contumelious conduct on the part of the second defendant especially since they had no concern for the constitutional rights of the plaintiffs. They acted in a high handed manner without any care and concern for the feelings of the plaintiffs. In my judgement, these circumstances sufficiently justified an award of aggravated damages to be meted out.

[95] I am aware that there is no fixed formula or rate for awarding aggravated damages for the tort of trespass. There is no exact science to be applied in

assessing such damages. However not to award damages would in my mind not vindicate the law and the breach of the plaintiffs' rights. Bearing all these concerns in mind and with careful consideration I was of the view that a sum of RM80,000 is a reasonable sum as compensation for all the distress, inconvenience and hardship all this while suffered by the plaintiffs. It is a sum I consider to be fair, not excessive and is modest commensuration for the plaintiffs' loss.

CONCLUSION

[96] For the reasons above, I allowed the plaintiffs' claim and having quantified the damages, the plaintiffs are entitled to damages in the aggregate sum of RM440,680 together with interest and costs.

Plaintiff's claim allowed, D2 ordered to pay the plaintiffs RM440,680 in damages together with interest and costs.

Reported by Ashok Kumar